

<b>Larry E. Knight, Inc. v QBE Ins. Corp.</b>
2008 NY Slip Op 31942(U)
June 30, 2008
Supreme Court, New York County
Docket Number: 0600892/2006
Judge: Martin Shulman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

JPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN  
Index Number: 600892/2006 **J.S.C.** Justice

PART 1

LARRY E. KNIGHT INC  
vs  
QBE INSURANCE CORP.  
Sequence Number : 001  
SUMMARY JUDGEMENT

INDEX NO. 600892/106  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_ motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>A-N</u>	<u>1</u>
<u>Cross-motion</u> Answering Affidavits — Exhibits <u>1-4</u>	<u>2</u>
Replying Affidavits <u>+ Exhs. A-5</u>	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are  
decided in accordance with the attached  
decision and order.

**FILED**  
JUL 07 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 30, 2008

MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
LARRY E. KNIGHT, INC., LARRY KNIGHT, and  
GRAPHIC ARTS MUTUAL INSURANCE CO.,

Plaintiffs,

-against-

QBE INSURANCE CORP. and JEM ERECTORS, INC.,  
(pertaining to an underlying action entitled: Richard  
Conrad v 105 Street Associates, LLC, et al.,

Defendants.  
-----X

Index No. 600892/06

**FILED**  
JUL 07 2008  
COUNTY CLERKS OFFICE  
NEW YORK

**MARTIN SHULMAN, J.:**

Defendants QBE Insurance Corp. ("QBE") and Jem Erectors, Inc. ("Jem") move, pursuant to CPLR 3212, for an order granting summary judgment. Plaintiffs Larry E. Knight, Inc., Larry Knight (collectively, "Larry Knight") and Graphic Arts Mutual Insurance Co. ("Graphic") cross-move, pursuant to CPLR 3212, for an order granting summary judgment.

Plaintiffs commenced this action seeking a judgment declaring that plaintiffs are entitled to a defense and indemnification in an underlying personal injury action brought by a Jem employee who tripped over some plywood debris at a construction project. The Larry Knight plaintiffs were the general contractors on the project. Plaintiff Graphic insured Larry Knight. Defendant Jem was the steel subcontractor on the project, and the defendant QBE was its insurer.

In support of its motion for summary judgment, defendant QBE alleges that Larry Knight is not an additional insured under the QBE policy, and that there is no written contract that requires Jem to name Larry Knight as an additional insured under the

QBE policy. In support of its motion for summary judgment, defendant Jem argues that: 1) the claim for contractual indemnification against it should be dismissed on the ground that Larry Knight has asserted an earlier identical claim against Jem in the underlying personal injury action; 2) the subcontract does not establish a duty to indemnify; 3) because it was not using any plywood on the day of the trip and fall there is no evidence of Jem's negligence; and 4) any claim against Jem for breach of the contract to purchase insurance should be dismissed because Larry Knight has its own insurance with Graphic.

In support of their cross motion for summary judgment, plaintiffs Larry Knight and Graphic argue that the subcontract requires Jem to defend and indemnify Larry Knight and that the QBE policy affords coverage to Larry Knight for the underlying loss. It is alleged that the plywood debris was Jem's responsibility because it was responsible for clean-up and there were no other sub-contractors working on the day of the trip and fall.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

To be entitled to indemnification, Larry Knight is required to demonstrate that no negligent act or omission on its part contributed to the underlying injury and that its liability is purely vicarious (Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 NY2d 786 [1997]). On these papers, there are issues of fact concerning the exact cause of the underlying trip and fall, precluding summary judgment in either the defendants' or the plaintiffs' favor on the claims for either common-law or contractual indemnification (Mannino v J.A. Jones Constr. Group, LLC, 16 AD3d 235 [1<sup>st</sup> Dept 2005]). The injured worker very clearly testified that he noticed debris before he tripped and fell, and that Jem was responsible for clean-up.

Contrary to the defendants' assertion, the subcontract between Larry Knight and Jem, at paragraph 4.6.1, requires indemnification. Moreover, the additional insured endorsement (Exhibit D to the motion) provides additional insured status to an entity "[a]s required by written contract" and there is some evidence that the policy issued by QBE to Jem names Larry Knight as an additional insured.

As to whether or not QBE timely disclaimed, if the claim falls outside the policy coverage, the insurer is not required to disclaim (National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570 [1<sup>st</sup> Dept 2006]).

Finally, the fact that some of the same claims, such as the duty to defend any claims arising out of the subcontract, and whether Jem procured insurance coverage

required thereunder, are now pending in the personal injury action, is not a basis for dismissal, at this juncture, of this separate declaratory judgment action (Callan v Structure Tone, Inc., 2008 WL 2369782, 2008 NY App Div LEXIS 5278, [1<sup>st</sup> Dept 2008]).

Accordingly, it is

ORDERED that the motion and the cross motion are both denied.

Counsel for plaintiffs and defendants are directed to appear for a status conference on August 5, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York  
June 30, 2008



HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUL 07 2008  
COUNTY CLERK'S OFFICE  
NEW YORK